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IN THE

Supreme Court of the United States

October Term, 1968

No. 1046

E. T. BARWICK and E. T. BARWICK MILLS, INC.,

Petitioners,

—against—

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE, GEORGE A. SPATER and V'SOSKE SHOPS, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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February 27, 1969

TABLE OF CONTENTS

	PAGE
Statement	1
The Parties	2
The Preliminary Negotiations	2
Mr. Barwick's Offer of October 10, 1963	4
The Extension of the Offer of October 10, 1963	4
The Formation of the Agreement	4
The Confirmation of the Agreement	7
The Procedures to Consummate the Purchase	8
Barwick's Repudiation of March 9, 1964	10
The Holdings of the Courts Below	11
Reasons for Denying the Writ	11
Conclusion	15

Table of Authorities

Cases

Crabtree v. *Elizabeth Arden Sales Corporation*, 305 N.Y. 48, 110 N.E.2d 551 (1958) 14

Interstate United Corporation v. *White*, 388 F.2d 5 (10th Cir., Nov. 22, 1967, rehearing denied Feb. 12, 1968) 14

PAGE

Marks v. *Cowdin*, 226 N.Y. 138, 123 N.E. 139 (1919) 15

Rubinstein v. *Rubinstein*, 23 N.Y.2d 293,——N.E.2d —— (1968) 14

Sanders v. *Pottlitzer Bros. Fruit Co.*, 144 N.Y. 209, 214, 39 N.E. 75 (1894) 14

United States v. *United States Gypsum Co.*, 333 U.S. 364 (1947) 12

STATUTES

Rule 52(a) of the Federal Rules of Civil Procedure 11

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Statement

Respondents T. C. V'Soske, S. T. V'Soske, K. A. V'Soske, George A. Spater and V'Soske Shops, Inc. ("the V'Soskes") brought suit against petitioners, E. T. Barwick and E. T. Barwick Mills, Inc. ("Barwick") in the Supreme Court, New York County on June 22, 1964 claiming damages in amount of $775,000 by reason of the breach by Barwick of a written contract in which Barwick had agreed to purchase the assets and good will of V'Soske Shops, Inc. for a sum equal to its audited net worth plus $700,000 (4a-8a).*

Following removal to the United States Court for the Southern District of New York by reason of diversity of citizenship, the case was tried before Judge Lloyd F. MacMahon, without a jury, on April 15-17, 1968.

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* References are to pages in the joint appendix. All italics are added unless otherwise noted.

The Parties

Respondents, T. C. V'Soske, S. T. V'Soske, K. A. V'Soske and George A. Spater are all of the individual stockholders of V'Soske Shops, Inc., a small Puerto Rican corporation engaged in the manufacture of high quality custom-made rugs (4a, 83a-84a, 180a).

Petitioner E. T. Barwick is president and majority stockholder of E. T. Barwick Mills, Inc. (5a, 9a).

E. T. Barwick Mills, Inc. is a Georgia corporation (4a, 9a). It is the world's largest manufacturer of tufted carpets with annual sales in excess of $90,000,000 (275a). Prior to 1964 Barwick Mills was not in the custom-made rug market (Ex. P-1; 21a).

The Preliminary Negotiations

In June of 1963 Mr. E. T. Barwick became interested in the possibility of entering the custom-made rug market by acquiring the business of V'Soske Shops, Inc. and its subsidiaries. He visited with the V'Soskes in Puerto Rico on June 26-27, 1963 and inspected their plant at Vega Baja (59a). At this initial meeting Mr. Barwick outlined his desire to enter the custom carpet field and to acquire the business of V'Soske Shops, Inc. (14a, 59a-60a, 169a-170a).

At Thad V'Soske's suggestion Mr. Barwick subsequently met in New York with Mr. George A. Spater on August 15, 1963 (60a, 169a). Mr. Spater, then Executive Vice President and General Counsel of American Airlines, Inc., was one of the V'Soskes' oldest friends and had frequently acted as their attorney and adviser (34a-35a).

Mr. Barwick and Mr. Spater discussed the proposed acquisition at some length. Mr. Barwick made plain his

desire to purchase V'Soske's entire business, including that of its Irish subsidiary, V'Soske Joyce, Ltd., as well as his desire to enter employment contracts with the V'Soskes (Ex. P-1; 36a-37a, 170a).

On September 3, 1963 Mr. Barwick paid a second visit to the V'Soskes in Puerto Rico (170a). Again he emphasized his wish to buy the business and retain the services of the V'Soskes under a five year employment contract (Ex. P-9; 14a). When Thad V'Soske asked $4,000,000 for the business, Barwick countered with an oral offer of $1,500,000 (60a-61a, 170a-171a). The visit concluded with Mr. Barwick stating that he would think the matter over and would write Mr. V'Soske further on his return to Atlanta (61a, 171a).

On September 9, 1963 Mr. Barwick wrote Mr. V'Soske:

> "Referring to our conversation, I have been thinking over and discussing with our organization the transaction under discussion, and I am prepared to offer you $1,600,000 for the V'Soske Shops, Inc., subject of course to independent audits concerning the $1,000,000 net worth of the manufacturing entity.
>
> "I should like to suggest that if the transaction is acceptable to you, the initial payment of $1,000,000 for the company and the remaining $600,000 over the next four years in equal payments.
>
> "All phases of operations and management would be along the lines of our conversation.
>
> "After you have had time to consider this proposal, I shall be very glad to hear from you" (Ex. P-9; 14a).

Thad V'Soske replied on September 26, 1963, suggesting that the matter be given further consideration (Ex. P-10; 16a-17a).

Mr. Barwick's Offer of October 10, 1963

On October 10, 1963 Mr. Barwick wrote Thad V'Soske concluding:

> "I am willing, at this time, to increase my offer for a cash settlement for the audited book value of your company plus $700,000 to be paid in five equal annual installments of $140,000 each, with management contracts or arrangements as we discussed on our two visits.
>
> "I think this is as far as I am willing to go, and I should like to know within thirty days *whether or not this offer will be accepted* because I do not feel I can wait much longer before entering into this type of manufacture, perhaps in closer proximity to my plants in North Georgia.
>
> "I appreciate your letter very much and I hope to hear from you shortly" (Ex. P-2; 18a-21a).

The Extension of the Offer of October 10, 1963

On October 28, 1963 Thad V'Soske wrote Mr. Barwick requesting that his offer be extended for another thirty days (Ex. P-11; 22a). On November 1, 1963 Mr. Barwick granted the requested extension, stating "Please let me know as soon as possible your decision" (Ex. P-12; 23a, 185a).

The Formation of the Agreement

On November 29, 1963 Thad V'Soske wrote Mr. Barwick stating:

> "We have reviewed your offer carefully and have come to the conclusion that we are willing to sell our

business at the price you propose—its audited net worth plus $700,000—on the following terms:

"1. $1,200,000 down, payable within 30 days after an agreement is reached; the balance to be paid in equal monthly installments over a period of four years.

"2. Employment contracts will be signed with our five top management people for five years at present rates of compensation (aggregating $74,500.00 annually) for jobs having responsibility equal to their present jobs and at their present location in Puerto Rico, as per verbal agreement.

"3. Any brokerage or finder's fees, whether to Mr. Fred Thaheld or anyone else to whom you may have talked, be paid by you.

"4. The scope of the audit to be as outlined below" (Ex. P-3; 24a-27a).

Mr. V'Soske carefully outlined how "audited net worth", which was the cornerstone of the agreement set forth in the first paragraph of his letter, was to be determined. (Audited net worth is, of course, the equivalent of "audited book value" which had similarly been the cornerstone of Mr. Barwick's offer of October 10, 1963.) Audited net worth was to be determined by an independent audit to be made by a nationally recognized firm of certified public accountants comparable to Haskins & Sells. In making that determination three items were to be treated differently from what might otherwise have been done. Wool was to be recorded at V'Soske's cost without freight. Fixed assets were to be recorded at cost (less depreciation) with the exception of the Hummingbird machines which were to be taken as recorded on V'Soske's books at $3,100 each, installed, with frames, for an aggregate of approxi-

mately $238,700.* Advances to V'Soske's Irish affiliate totaling $93,000 were to be "accepted as made" (Ex. P-3; 24a-27a).

Mr. V'Soske concluded by inviting any examination Mr. Barwick might wish to make as to the correctness of his representations or any discussions Mr. Barwick might wish to have with Haskins & Sells about V'Soske's books and the financial statements which they had certified.

On December 2, 1963 Mr. Barwick wrote Mr. V'Soske stating:

> "I agree in principle with your outline of evaluation and I see no obstacle in our agreeing inasmuch as I have a high regard for Haskins & Sells inasmuch as they audit our spinning plants. Our overall public accountant is Arthur Anderson whom I am sure you have respect for also and I am sure Arthur Anderson and Haskins & Sells will have no difficulty in reconciling the account" (Ex. P-13; 28a-29a).

He then requested clarification as to the price at which the Hummingbird machines had been recorded, verification that the Irish affiliate property was included in the overall purchase price and the name of the fifth member of the top management group.

After receiving the requested information Mr. Barwick stated he was in accord with the agreement, writing on December 6, 1963:

> "Dear Thad:
>
> "This will acknowledge with thanks your letter of December 4th.

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* The Hummingbird machines had, in fact, been appraised by Chas. T. Main Company of Boston, Mass. at over $15,200 each.

"As stated in my recent letter I am in accord with your outline for purchase.

"I should like, if it is convenient with you, to visit you on the 19th and 20th of December with Mr. Mel E. Kellar, our Vice President and Treasurer to begin procedures for consummating the purchase.

"Please advise me if this time of visit is satisfactory with you" (Ex. P-15; 32a).

By this exchange of correspondence, an agreement had been made for the purchase of V'Soske Shops, Inc. at its audited net worth plus $700,000 and on the other conditions outlined. All that was needed to consummate the agreement was to determine audited net worth in the manner set forth in the letter of November 29, 1963.

The Confirmation of the Agreement

To begin procedures for consummating the purchase Mr. Barwick again visited with Mr. V'Soske in Puerto Rico on December 19 and 20, 1963. On this occasion he was accompanied by his treasurer, Mr. Mel E. Kellar, his attorney, Mr. Furman Smith, and a Mr. B. A. Talley who was to move to Puerto Rico to run the financial end of the V'Soske business for Mr. Barwick (87a, 172a).

The Barwick group visited the Haskins & Sells office in San Juan. There they examined the records of the audits of V'Soske Shops and the various income tax returns filed by V'Soske Shops (200a, 239a, 257a, 278a). Once again Mr. Barwick toured the V'Soske plant in Vega Baja where requested books and records were made available for inspection. This visit concluded with the understanding that the independent audit to determine audited net worth would commence immediately after the year end closing (Ex. P-28; 279a).

So far as the V'Soskes were advised, all that remained to be done was to determine "audited net worth" and consummate the purchase in accordance with the agreement of the parties. That this was likewise Barwick's understanding is evidenced by a letter written on December 26, 1963 by Barwick's treasurer addressed to Barwick's lenders in New York:

"Mr. Arthur Typermass
Investment Department
Metropolitan Life Insurance Company
1 Madison Avenue
New York, N.Y.

"Dear Art:

"We had a successful trip to Puerto Rico regarding the V'Soske Shops deal and the basis of an agreement which is the same as that outlined to you on my recent trip has been reached. The deal will be consummated on the receipt of the audit report about the middle or end of February.

"Kindest regards.

"Yours very truly,

"E. T. Barwick Mills, Inc.
"Mel Kellar
Vice Preside ' & Treasurer" (Ex. P-28; 279a).

The Procedures to Consummate the Purchase

In early January 1964 the independent audit to certify the net worth of the V'Soskes' business began. A physical inventory, in which Barwick's accountants and experts

participated, was completed to the satisfaction of all concerned (100a, 131a-132a).

At a meeting in San Juan on January 18, 1964 Barwick's representatives advised the V'Soskes that they wished to close the transaction by purchasing assets. This procedure was satisfactory to the V'Soskes and it was understood that the business would be run for Barwick's account from and after January 1, 1964 and that all transactions, other than in the ordinary course of business, would be cleared with Mr. Barwick (Ex. D-B; 242a). Mr. Barwick's attorney agreed to draft a formal agreement so as to effect a closing of the transaction on this basis immediately following the accountants' certification of audited net worth (54a, 217a).

At this meeting Mr. Barwick's attorney suggested that Mr. Barwick should have a right to cancel the V'Soskes' employment contracts at any time without cause upon payment of one half their salaries for the balance of the five year term (213a). The V'Soskes in response suggested that the price of such a cancellation right should be double the admittedly low salaries (41a, 213a, 219a, 249a).

Since Mr. Barwick was not present, Mr. Kellar, Barwick's treasurer, suggested that the matter be left up to Mr. Barwick, who would surprise the V'Soskes by his generosity. This suggestion was adopted and the meeting broke up early for a game of golf (41a, 214a).

The matter was resolved at a meeting of the two principals on the afternoon of March 2, 1964. Mr. Barwick agreed that the price for such a cancellation right would be the full salary called for by the agreement and that automobile expense and the expense of maintaining the guest cottage for business visitors at Mr. V'Soske's home would be included in Mr. V'Soske's reimbursable business

expenses. These details were set forth in the final draft of employment contract prepared by Barwick's attorneys on March 5, 1964 (Ex. P-26; 251a, 253a). The resolution was what would have been implied under the basic agreement even if not spelled out.

The parties also agreed on the final form of the formal contract which was prepared by Barwick's attorneys and transmitted to V'Soskes' attorneys on March 5, 1964 (Ex. D-C). None of the provisions of the formal agreement altered the terms set forth in the agreement arising out of the parties' correspondence.

Meanwhile the accountants had proceeded with the work of certifying the audited net worth of the business. By March 4, 1964 the parties were only about $13,000 apart on the final figure for such audited net worth (108a, 269a). The March 4 meeting concluded with the understanding that a final certification of audited net worth would be made and the formal closing of the transaction effected on March 24, 1964 (108a, 279a, 292a).

Barwick's Repudiation of March 9, 1964

On March 9, 1964 Mr. Barwick repudiated his agreement to purchase V'Soske's business. He wrote Thad V'Soske:

> "Dear Thad:
>
> "Since my return from Puerto Rico, I have reviewed the situation and have come to the conclusion that we should terminate negotiations looking toward the purchase of your business.
>
> "There are many reasons that led me to this conclusion. but I do not think any useful purpose would be served in detailing them" (Ex. P-20; 179a).

The Holdings of the Courts Below

The District Court held that the parties in their correspondence never reached an agreement, finding that it "was plain from the beginning that the parties did not intend to be bound until a written agreement had been signed and delivered". Consequently it ordered the action dismissed on the merits (329a-334a, 338a).

On November 8, 1968 the Court of Appeals, held that "By their correspondence, the parties entered into a valid contract, which Barwick breached by his letter of March 9, 1964" and specifically stated that it found "no evidence" substantiating the claim that the parties understood their correspondence to be of no legal effect or that V'Soske had reason to know that Barwick contemplated that no obligations should arise until a formal contract was executed (Petition A 8, A 10).* Since the trial court had not had an opportunity to consider the issue of damages, the case was remanded for that purpose.

A petition for rehearing was denied on December 2, 1968 and a suggestion for rehearing in banc was denied on December 30, 1968, "no active circuit judge having requested that a vote be taken on said suggestion" (Petition A 19).

Reasons for Denying the Writ

1. Petitioners' contention that a majority of the Court of Appeals failed properly to apply the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure is without foundation.

Petitioners claim that the "most important question in this case" is whether the parties intended to be bound

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* *V'Soske* v. *Barwick*, 404 F.2d 495, 499, 500.

before the execution of formal written documents and that this is "clearly an issue of fact" (Petition, p. 6). Even assuming this is an issue of fact, what petitioners' argument overlooks is that the Court of Appeals applied to this issue an even sterner test than that contemplated by Rule 52(a).* The majority could find *no evidence* to support a contention that Barwick contemplated that no obligation should arise until a formal contract was executed, saying, 404 F.2d at 499 (Petition A 8):

> "To overcome the reasonable inference we draw from the language of the correspondence that the parties did indeed intend thereby to create a binding contract, appellees must do more than merely point to the circumstance that a formal document was contemplated: they must show either that both parties understood that their correspondence was to be of no legal effect or that V'Soske had reason to know that Barwick contemplated that no obligations should arise until a formal contract was executed. *But appellees have referred to no evidence substantiating either of these possibilities, and we do not find them supported by our independent review of the evidence.*"

Foreclosing all argument on this score is the testimony of Mr. Barwick that he himself did not intend that a formal contract be executed before either party was bound in this transaction. Mr. Barwick's testimony on this subject is clear:

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* "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1947). *A fortiori* a finding is "clearly erroneous" when there is no evidence to support it.

"'By Mr. Sullivan:

Q. Mr. Barwick, did you intend that formal contracts of purchase and sale be executed by both parties before either party was bound in this transaction?

A. No. I left this pretty much to Mr. Kellar and Mr. Smith'." (181a)

Yet petitioners produced no evidence that either Mr. Kellar or Mr. Smith intended that a formal contract should be executed before either party was bound.

The holding of the Court of Appeals that there was "no evidence" to support the findings of the District Court on this point, which petitioners themselves assert is the "most important question in this case", thus constitutes a holding that the finding of the District Court was clearly erroneous.

Finally, petitioners claim that the Court of Appeals arrogated to itself the question of passing on the credibility of certain testimony (Petition, pp. 8-9). The testimony dealt with the question of whether or not respondents' counsel had orally rescinded the contract on March 2, 1964. It is clear that the Court of Appeals did not overrule the District Court on this since the District Court had ruled that the testimony did not prove a rescission.*

The decision of the Court of Appeals was correct. Not a single active circuit judge voted for a rehearing in banc as requested by petitioners (Petition A 19).

2. The suggestion that the majority of the Court of Appeals misapprehended applicable New York law is likewise invalid.

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* The District Court held, "I do not think there was a rescission" (Petition A 16).

The fact that Mr. Barwick subsequently sought to amend the agreement to include new terms and that the V'Soskes made counter-suggestions with respect to such new terms, does not defeat the original agreement. "Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions", *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N.Y. 209, 214, 39 N.E. 75, 76 (1894). See also, *Rubinstein* v. *Rubinstein*, 23 N.Y.2d 293, 296, —— N.E.2d —— (1968) where specific enforcement of an agreement contemplating an accountant's certificate and a valuation of realty was ordered despite subsequent disputes "as to how various details of the transaction should be worked out."

The claim that the holding of the Court of Appeals implicitly disregarded decisions under New York law as to what is required to satisfy the Statute of Frauds is also without foundation. Contrary to petitioners' contention (Petition pp. 13-14) there is no doubt here as to who the sellers were. Mr. Barwick knew that the V'Soske brothers were the owners and sellers of their business and that Thad V'Soske in writing "*We* have reviewed your offer carefully and have come to the conclusion that we are willing to sell *our* business" (Ex. P-3; 24a), was acting as spokesman for the individual respondents (Ex. P-27; 75a). Where, as here, both parties have signed the correspondence constituting the agreement, the requirements of the Statute of Frauds are satisfied. *Interstate United Corporation* v. *White*, 388 F.2d 5 (10th Cir., Nov. 22, 1967, rehearing denied Feb. 12, 1968); *Crabtree* v. *Elizabeth Arden Sales Corporation*, 305 N.Y. 48, 110 N.E.2d 551 (1958). "The memorandum exacted by the statute does not have to be in one docu-

ment. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion." *Marks* v. *Cowdin*, 226 N.Y. 138, 145, 123 N.E. 139, 141 (1919).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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